

**JOSEPH LAURENCE PALIGARU v N SOLANKI & CO
(HBA0015 of 2011L)**

HIGH COURT — CIVIL JURISDICTION

5

WICKRAMASINGHE J

23 January, 16 March 2012

10 **Courts and judicial system — High Court — jurisdiction — appellate — appeals
from decisions of Magistrates’ Court — no right of appeal from decisions of
Magistrates’ Court exercising appellate jurisdiction under written law —
Administration of Justice Decree s 6 — Fair Trading (Amendment) Act — High
Court Act s 40 — Magistrates Courts Act ss 7(3), 16, 36, 36(1), 36(2), 38, 39, 40 Pt V
15 — Small Claims Tribunal Decree ss 4, 15(1), (4), 16, 17, 24(5), 33, 33(2)(a), 33(2)(b).**

The appellant lodged a claim with the Small Claims Tribunal. The referee constituting
the Tribunal dismissed the claim. The appellant appealed from the referee’s decision to the
Magistrate’s Court, invoking the appellate jurisdiction of that Court under s 33 of the
Small Claims Tribunal Decree 1991 (the Decree), which dismissed the appeal. The
20 appellant sought to appeal from the decision of the Magistrate’s Court to the High Court.
At issue was whether the High Court had jurisdiction to hear an appeal from a decision
of the Magistrate’s Court in exercise of that Court’s appellate jurisdiction.

Held –

25 There is no right of appeal to the High Court under s 36 of the *Magistrates’ Court Act*
from a decision made by a Resident Magistrate exercising appellate jurisdiction under any
other written law, such as the Decree.

Appeal dismissed.

Cases referred to

30 *Aryan Enterprise v Mehak Unique Fashion* [2011] FJHC 727 (10 November 2011);
Chand v Chand [1999] FJHC 61 (12 July 1999); *Mann Chad v Waliman Khan*
[2000] HBA 5 of 2000 (13 April 2000); *Sharma Rental Cars v AnareSovu* HBA 17j
of 2002S (12 February 2004); *Sheet Metal and Plumbing (Fiji) Ltd v Uday Narayan*
Deo [1999] FJHC 7 (14 April 1999), considered.

35 *Attorney General v Prince Ernest Augustus of Hanover* [1957] 1 All ER 49; *Brett*
v Brett (1826) 3 Add 210, 162 ER 456; *Corocraft Ltd v Pan American Airways Inc*
[1968] 3 WLR 714; *London & North Eastern Railway Co v Berriman* [1946] 1 All
ER 255 (H.L.); *Shameem Mohammed v Imdad Ali* Civil Appeal No 004/2011(18
November 2011), cited.

Appellant in person.

40 *Mr Kumar* instructed by *Young & Associates* for the Respondent.

Wickramasinghe J.

INTRODUCTION

45 [1] This is an appeal from the Magistrates’ Court where his Worship
Rangajeewa Wimalasena Resident Magistrate dismissed the appeal of the
appellant, exercising his appellate jurisdiction conferred upon him under
s 33(2)(b) of the Small Claims Tribunal Decree 1991 (**Decree**).

50 [2] The appellant lodged a claim in the Small Claims Tribunal (**Tribunal**) on
13 January 2010 alleging that the 14” Television purchased by him from the
Respondent was defective and faulty. He sought the refund of the purchase price
of \$220.00 and other incidental expenses, which he estimated at \$730.00.

[3] On 25 April 2010, the Referee of the Tribunal dismissed the claim. Being aggrieved by the said decision the appellant appealed to the Magistrates' Court. The learned Magistrate, by his order dated 18 August 2011, dismissed the appeal and ordered the payment of costs, which he summarily assessed in the sum of \$100.00. It is against the order of the learned Magistrate that the appellant had preferred an appeal to this Court.

[4] I heard the appeal on 23 January 2012. The appellant was not present nor represented on the date of the hearing but filed written submissions. In the absence of the appellant, Mr Kumar, counsel for the respondent, made some introductory remarks regarding the background of the facts, and moved court to determine the appeal on the written submissions filed by both parties. I then reserved my judgment on notice.

[5] Later, I was in doubt whether this court had jurisdiction to determine an appeal preferred against a Magistrate's order that had been made exercising the appellate jurisdiction conferred upon a Magistrate under s 33(2)(b) of the Decree. I therefore once again invited both parties to make submissions relating to jurisdiction, albeit they did not raise the issue.

JURISDICTION

[6] Needless to say, that the Small Claim Tribunal Decree is a specialized written law especially enacted to establish Small Claims Tribunals and their functions.

[7] The claimant in his written submissions submits that the Court has jurisdiction to determine the matter under part V of the Magistrates' Courts Act, especially under s 36. The Respondent in its submissions denied that the court has jurisdiction to determine the matter under s 36 but said that the court could consider the appeal under s 39 of the Magistrates' Courts Act. In support, the respondent cited *Shameem Mohammed v Imdad Ali* Civil Appeal No 004/2011(18 November 2011) where a similar appeal was considered by the High Court.

[8] The 'right of appeal' is a statutory right thus must be conferred by Statute, or else it does not exist.

[9] Before embarking on the jurisdictional issue, let me first delve on the ethos of the Decree. I have aided myself with the following rules of construction of statutory law in my interpretation.

[10] It is trite law and a cardinal principle of construction of a statute that its interpretation should be derived from the intention of the legislature. As observed in *Corocraft Ltd v Pan American Airways Inc* [1968] 3 WLR 714 at 732; *London & North Eastern Railway Co v Berriman* [1946] 1 All ER 255 (HL) the intention of the legislature is assimilated considering two aspects; ie (i) the concept of meaning and; (ii) the concept of determining the purpose, objectives and practical effect of the statute as a whole. According to BLACKSTONE the most fair and rational method for interpreting a statute is by exploring the intention of the legislature through the most natural and probable signs which are 'either the words, the context, the subject matter, the effects and consequence, or the spirit and reason of the law'. Sir John Nicholl observed in the case of *Brett v Brett* (1826) 3 Add 210: 162 ER 456, 458 referred to in *Attorney-General v Prince Ernest Augustus of Hanover* [1957] 1 All ER 49, 57 (HL) 'the key to the opening of every law is the reason and the spirit of the law'.

[11] The Decree was promulgated in 1991 after the 1987 coup, hence the law was created as a Decree *vis a vis* an Act. Therefore, the Hansard is not available for perusal to draw inferences of the intention of the legislature.

[12] The Small Claim Decree is the edict of the lawmaker. Let me therefore expound the ethos of the Decree commencing from its preamble, which sets out the objects of the Decree. The preamble reads:

5 ***‘A DECREE TO ESTABLISH SMALL CLAIMS TRIBUNALS IN FIJI, TO PROVIDE PROMPT AND INEXPENSIVE RELIEF TO CLAIMANTS’***

[13] It is apparent that the referent of the Decree as envisaged in the preamble is to establish a tribunal to determine small claims where its disposal is expected to be prompt and inexpensive. The primary function of the Tribunal is to settle
10 the dispute within a reasonable time as envisaged in s 15(1). The Tribunal is empowered to determine the dispute only if the settlement efforts fails. An attempt to settle is therefore a prerequisite to determine a dispute. If however, the Tribunal proceeds to determine the dispute, s 15(4) of the Decree empowers the
15 Tribunal to determine the dispute according to the substantial merits and justice of the case relating to the law but it is not bound to give effect to strict legal rights or obligations or to legal forms or technicalities.

[14] Section 24(5) of the Decree prohibits legal representation at the tribunal. Simple, inexpensive and swift justice is thus the underlying ethos and the discernible object of the Decree.

20 [15] Section 4 of the Decree empowers either a Referee or a Resident Magistrate to determine a claim in the first instance. Both the Referee and the Resident Magistrate (as the case may be), could then make orders as set out in s 16 of the Decree. It could thus be seen that both the Resident Magistrate and the Referee exercise similar jurisdiction under the Decree. Simply, the Resident
25 Magistrate determining a claim under the Decree wears the cap of the Referee and not of a Magistrate.

[16] The right of appeal against a decision of the Tribunal, ie, either of the Referee or the Resident Magistrate, is conferred in s 33(2) of the Decree, which
30 provides as follows:

(2) an ***appeal*** brought pursuant to subsection (1) shall be made:

(a) if against an order made by the Resident Magistrate exercising the jurisdiction of the Tribunal to the High Court: and

(b) in any other case to the Magistrates' Court.

35 [17] The appellate rights conferred in s 33(2) above stems from the jurisdiction conferred upon the Referee or the Resident Magistrate (as the case may be) under s 4 of the Decree. Section 33(2)(a) confers a statutory right of appeal to the High Court if the Resident Magistrate determines the matter and similarly, when the Referee determines the matter, the right of appeal is conferred upon the Resident
40 Magistrate in s 32(b). It is a principle of law that ‘he who heard the cause must not hear his own appeal’. Therefore, in my mind, the distinction of the two courts of appeal as stipulated in sub paragraphs (a) and (b) of s 33(2) of the Decree can only be attributed for logistical purposes as an enabler of the appeal process, as the Magistrate cannot or should not hear its own appeal.

45 [18] Moreover, on a perusal of the Decree as a whole it appears that the intention of the lawmaker had been to permit both High Court and the Magistrates' Court to exercise similar appellate jurisdiction when hearing appeals from the Tribunal. The question thereafter is whether the litigants of the Tribunal enjoy the same right of appeal enjoyed by other litigants in civil cases. That is
50 whether the right of appeal conferred by part V of the Magistrates' Courts Act permits a second right of appeal against a decision of the Resident Magistrate,

sitting in its appellate jurisdiction. A consequential question then also arises whether a second right of appeal to the Court of Appeal would lie from the appellate jurisdiction exercised by the High Court under s 33(2) (a) of the Decree.

[19] Section 6 of the Administration of Justice Decree 2009 confer the
5 jurisdiction of the High Court and reads:

Jurisdiction of High Court

6.(1) *The High Court has unlimited **original jurisdiction** to hear and determine any civil or criminal proceedings under any law and such other original jurisdiction as is conferred on it under this Decree or any other law.*

10 (2) *The High Court has jurisdiction, **subject to the conferral by written law of rights of appeal** and to such requirements as may be prescribed by law, to hear and determine appeals from all judgments of subordinate courts.*

15 (3) *The High Court has jurisdiction to supervise any civil or criminal proceedings before a subordinate court and may, on an application duly made to it, make such orders, issue such writs and give such directions as it considers appropriate to ensure that justice is duly administered. (**Emphasis added**)*

[20] It is clear from s 6(2) of the Administrative Law Decree that the High Court must be conferred with the right of appeal to enable the High Court to exercise its jurisdiction. The enabling law would in the instant case be either the
20 Magistrates' Courts Act (MCA) or the Decree.

[21] Both parties to this action relied on s 36 and 39 of the Magistrates' Courts Act in aid of the former interpretation.

Magistrates' Courts Act

25 [22] Section 7(3) of the Magistrates' Court Act¹, confer jurisdiction on the Magistrates to exercise the powers under the MCA or **any other Act**.

[23] Section 16 of the MCA as amended by Magistrates' Courts Act (Amendment) Promulgation No 34 of 2007 set out the civil jurisdiction of
30 Magistrates as follows:

16(1) – **Without prejudice** to the jurisdiction of a magistrate under this Act or **other written law**, a resident magistrate shall have and exercise jurisdiction in the following civil causes;..... and sets out five causes (a) to (e). (**Emphasis added**).

[24] I must emphasize that the civil jurisdiction stipulated in s 16 relates to
35 *original* civil jurisdiction of a Magistrate and not appellate jurisdiction.

[25] Part V of the MCA provides for litigants aggrieved by a decision of the Magistrate either exercising civil or criminal jurisdiction to appeal to the High Court as stated therein.

[26] For convenience let me reproduce below the relevant sections of the
40 appellate procedure set out in part V of the **MCA**.

PART V – APPEALS

Appeals in Civil Cases

Civil appeals

45 36. (1) *Subject to the provisions of this Act, an appeal shall lie to the Supreme Court (now High Court) from a resident magistrate in the following cases:-*

(a) *from all final judgments and decisions; and*

(b) *from all interlocutory orders and decisions made in the course of any suit or matter before a magistrates' court*

50 1. S 7(3) of the MCA—"All magistrates, when so appointed shall have and exercise the powers and jurisdiction conferred upon them by this or **another Act**". (**Emphasis added**)

(2) An appeal shall lie to the Supreme Court (now High Court) from all judgments, decisions or orders of a resident magistrate sitting in its appellate jurisdiction under s 40.

.....

5 *Appeal from second or third class magistrates*

40 (1) An appeal from all judgments, decisions or orders of a second or a third class magistrate shall lie to a resident magistrate.

(2) The provisions of sections 37 and 38 shall, mutatis mutandis, apply to appeals from second and third class magistrates.

Appeals in Criminal Sections Criminal Appeals

10 *41. Appeals in criminal causes shall lie from magistrates' courts in accordance with the provisions of the Criminal Procedure Code.*

[27] A careful scrutiny of s 36 of MCA clearly sets out two instances where right of appeal to the High Court exists. Firstly, under s 36(1) when the Resident Magistrate makes either final or interlocutory orders; secondly, under s 36(2) when the Resident Magistrate makes an order exercising appellate jurisdiction.

[28] The objects of the MCA are the establishment of Magistrates Courts and to conduct criminal and civil proceedings within the jurisdictional limitations stated therein. The operative words in s 36 are '*subject to the provisions of this act*', which is seen at the beginning of the section. The Act contemplated within the operative words is the Magistrates' Court Act and not any other written law. The entire section is dictated by these operative words. Therefore when a party is aggrieved by the decision of the Magistrate exercising its '*original civil jurisdiction*' then the civil appeal provisions contemplated in s 36(1) permits an aggrieved party to appeal against the Magistrate's order to the High Court. The section only contemplates cases where the Magistrate exercises original civil jurisdiction under s 16 of the MCA. The appeals contemplated in part V s 36(1) of MCA are therefore restricted to such cases.

[29] My conclusions are further fortified when considering s 36(2), which provides for Magistrate's Orders made in the exercise of appellate jurisdiction. The only instance where an appeal can lie from the Magistrate exercising appellate jurisdiction under the MCA is under s 36(2), i.e., when it arises out of a decision made under s 40 of the MCA. The appellate procedure set out in s 36(2) of the MCA does not provide for appeals from any other written law. Nor can the civil jurisdiction conferred upon the Magistrate in s 16 of MCA to determine civil causes under 'other written law' be construed to include a decision made by the Magistrate exercising appellate jurisdiction under the Decree. The appellate jurisdiction exercised by the Resident Magistrate under s 36(2) is akin to the appellate jurisdiction reflected in s 33(2)(b) of the Decree. As I said earlier, a right of appeal is not a common law right but a statutory right. If the legislature intended a right of appeal against any judgments, decisions or orders made by a Magistrate exercising appellate jurisdiction apart from the currently available provisions in s 36(2), then the legislature must enact such rights of appeal in s 36(2) or under any other written law. Whilst scrutinizing the above provisions, I find that there is no right of appeal provided for in s 36 of the MCA for decisions made by the Resident Magistrate exercising appellate jurisdiction under any other written law such as the Decree. In the absence of specific powers granting right of appeal to the High Court as provided for in s 40 of the High Court Act, for decisions form appellate powers under other written laws, it is my view that the High Court is not mandated with right of appeal from the Resident Magistrate. Furthermore, I am of the view that an interpretation of

a words 'the decisions of the Resident Magistrate exercising appellate jurisdiction' to be included in the words 'all decisions of the Magistrate' stated in s 36(1) of the MCA, would render the provisions of s 36(2) superfluous or redundant. I do not think the lawmakers contemplated such a situation.

5 [30] The above conclusions are also constant on a consideration of the following sections of the Decree.

[31] A Tribunal is empowered to make orders as set out in s 16 of the Decree. Section 17 of the Decree, makes all orders made by the Tribunal final and binding on the parties, subject to the **limited appealable grounds** set out in s 33 of the
10 Decree.

[32] Section 33 of the Decree provides as follows:

33(1) Any party to proceedings before a Tribunal may **appeal** against an order made by the Tribunal under s 15 (6) or s 31 (2) on the grounds that:

15 (a) The proceedings were conducted by the Referee in a manner which was unfair to the appellant and prejudicially affected the result of the proceedings; or
(b) The Tribunal exceeded its jurisdiction

[33] A careful analysis of this section envisages that the Court exercising appellate jurisdiction under s 33(1)(a) of the Decree is precluded from
20 considering an appeal on merits despite a palpable error of law. The only limited appealable grounds set out in s 33(1)(a) of the Decree, is for the appellant to establish that the Tribunal conducted the proceedings unfairly and thereby prejudicially affected the result of the proceedings. i.e., the Referee conducted the proceedings violating the basic principles of 'procedural rules' such as not
25 adhering to the rules of natural justice, *audi alteram partem* rule, etc.

[34] Clearly, the grounds of 'appeal' set out in s 33 are not the usual grounds of appeal that is seen in appeal cases. They are indeed the grounds considered in judicial review applications. It is evident on a plain reading of s 17 of the Decree
30 that the intention of the lawmakers was to seal appeals by placing a cap on appeals. The legislative restriction therefore only permits appeals on procedural irregularity.

[35] Generally litigants exercise a three tier right of appeal on matters arising from a Magistrates' Court. ie to the High Court, Court of Appeal and then to the
35 Supreme Court (subject to the jurisdictional limitations set out in the respective legislature). If the matter is originally heard by the High Court then the litigants enjoy a two tier right of appeal. If the general tiers of appeal are followed for appeals under the Decree then *ex facie* an aggrieved party before the Referee will have four tiers of appeal *vis a vis* three tiers of appeal to a claimant whose
40 original claim is heard by the Resident Magistrate. I am unable to construe that the lawmakers intended to create such an inequality among the litigants who seek relief under the Decree. Not only such construction of the Decree create inequality but it would also create absurdity in interpretation.

[36] Due to the foregoing reasons, I conclude that the High Court is not
45 conferred with jurisdiction to hear appeals from the decisions made by a Resident Magistrate exercising appellate jurisdiction under s 33(2)(b) of the Decree.

[37] In arriving at the aforesaid findings I have considered *Uday Narayan Deo v Sheet Metal and Plumbing (Fiji) Ltd* [1999] FJHC 7 of 1999 (14 April 1999);
Chand v Chand [1999] FJHC 61 (12 July 1999); *Aryan Enterprise v Mehak*
50 *Unique Fashion* [2011] FJHC 727 (10 November 2011); *Mann Chad v Waliman Khan* [2000] HBA 5 of 2000(13 April 2000); *Sharma Rental Cars v Anare Sovu*

HBA 17j of 2002S (12 February 2004) which has considered small claims tribunal matters. However, none of these cases considered the issue of jurisdiction in detail nor was it raised by any of the parties.

5 **Section 39 of the MCA**

[38] The respondent relies on s 39 of MCA in support of its argument on jurisdiction. It is my considered view that s 39 is a consequential section following s 38 and should be read together as a whole and not individually. For clarity I will reproduce both these sections, which read:

10 *Conditions precedent to appeal*

38. Subject to the provisions of s 39, the Supreme Court (now High Court) shall not entertain any appeal unless the appellant has fulfilled all the conditions of appeal imposed by the magistrates' court or by the Supreme Court, (now High Court) as prescribed by rules of court.

15 *Discretionary power of Supreme Court*

39. Notwithstanding anything hereinbefore contained, the Supreme Court (now High Court) may entertain any appeal from a magistrates' court, on any terms which it thinks just.

[39] Section 38 requires a litigant to fulfil all the conditions of appeal set out in the prescribed rules either of the Magistrates' Courts Act or High Court Act. The operative words in s 39 '*Notwithstanding anything hereinbefore contained*' empower the High Court to accept an appeal on 'any other term'. However, the section does not mention that the High Court could accept any 'form' of appeal. It has merely extended the conditions set out in the prescribed rules and nothing more. In the circumstances, I am unable to accept the claimant's assertion that s 39 could be construed as a conferral provision for jurisdiction.

Supervisory power of the High Court

[40] Section 6(3) of the Administration of Justice Decree 2009 confers jurisdiction to supervise any civil proceedings and make orders to ensure that justice is duly administered.

[41] I do not have a duly made application before me to supervise the matter. However, since the matter was referred to me on notice of appeal and I have determined that this court has no jurisdiction to hear the appeal, I will consider the appellant's application in the interest of justice without dismissing it under the supervisory powers conferred in the High Court under s 6(3) of the Administration of Justice Decree 2009.

[42] The learned Magistrate was required to consider the Order of the Tribunal, (Referee) on the grounds set out in s 33(1) of the Decree. As I said earlier, a court exercising powers under s 33 of the Decree cannot consider it on merits but only on grounds of procedural irregularities, which was unfair to the appellant and prejudicially affected the result of the proceedings.

[43] The appellant sets out the following errors under three separate headings:

45 *1. THAT the learned Magistrate erred in fact and in law in not addressing the fundamental ground of my appeal namely:-*

i) Bias

ii) Disregarding the relevant issue

2. THAT the learned Magistrate erred in fact and in law in not addressing the Implied Terms of the Contract in the Sale of Goods transaction namely

50 *(i) Good title*

(ii) Quite Possession

(iii) *Corresponding to Description*

(iv) *Merchantable Quality*

(v) *Fitness for purpose*

5 3. *THAT the learned Magistrate erred in fact and in law in not addressing the unconscionable conduct of the referee as stipulated in the Fair Trading (Amendment) Act 1998*

(a) *The bargaining powers of the parties ie the supplier compared to the customer*

(b) *Whether as a result of the conduct engaged by the supplier, the customer was required to comply with conditions that were not reasonable necessary for the protection of the legitimate interest of the supplier.*

10 (c) *Whether the customer was able to understand any document relating to the supply of goods and services.*

(d) *Whether any undue influence or pressure was exhorted or any unfair tactics were used against, the customer by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the goods or services.*

15 [44] Clearly, none of the errors stated in grounds 1(ii), 2(i) to (v) and 3(a) to (d) relate to procedural fairness set out within the ambit of s 33 of the Decree. In my judgment, the learned Magistrate has not erred in deciding any of those grounds of appeal.

20 [45] Ground 1(ii)- bias, may relate to the form and manner of conducting the hearing. I have therefore carefully considered the case record and the submissions filed by the appellant. The appellant did not particularize the alleged bias. Nor am I able to find any particulars suggesting bias on an examination of the case record. The entirety of the written submission of the appellant is based on error of law regarding the Fair Trading (Amendment) Act 1998, which is not
25 a ground that can be canvassed under s 33 of the Decree. I see no basis to determine that the learned Magistrate or the Referee acted with bias and I therefore dismiss the allegation of bias.

30 [46] I am satisfied that the learned Magistrate exercising his appellate jurisdiction reviewed the proceedings conducted by the Referee within the confines of s 33 of the Decree. I am also satisfied that he has given cogent reasons in arriving at the decision. Indeed, I find that His Worship has gone one step further and considered any abuse of process by perusing the case record. In arriving at this decision I especially consider paragraphs 7 and 8 of His Worship's Order, which read thus:

35 7. *Firstly it should be noted that at this stage, this Court cannot go into the merits of the original claim. It appears that the Appellant has tried to present the facts of this claim instead of showing the Court that the Tribunal has acted in an unfair manner. It should be noted that there is no material whatsoever in the Appellant's written submissions which suggests that the proceedings of the Tribunal were conducted in an unfair manner.*

40 8. *In any event I have perused the Small Claim Tribunal record pertaining to this case in the interest of justice. It appears that both parties have been properly heard by the Tribunal. Further, the Appellant (the Claimant) has been given opportunity to call witnesses too. I have observed that the Tribunal had even viewed the TV set in question and had satisfied that there is no defect in the TV.*

45 [47] Independent to the above, I am also convinced that the Referee has conducted the proceedings fairly. I therefore do not see any reason to interfere with the learned Magistrate's decision.

50 [48] Accordingly, I uphold the decision of the learned Magistrate dated 18 August 2011 including the Costs order. Considering the nature of the application, I do not award any further Costs in this appeal.

Order

1. Magistrate's order dated 18 August 2011 upheld.
2. This appeal is dismissed.

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Appeal dismissed.

Justin Carter
Barrister

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